

1. 1213254 (Migration) [2016] AATA 3838 (2 May 2016)

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DECISION RECORD

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DIVISION: Migration & Refugee Division

APPLICANT: Mr Shitanshu Behal

CASE NUMBER: 1213254

DIBP REFERENCE(S): BCC2009/475420

MEMBER: Karen Synon

DATE: 2 May 2016

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Skilled (Provisional) (Class VC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 485 (Skilled - Graduate) visa:

- Public Interest Criterion 4020 for the purposes of cl.485.224 of Schedule 2 to the Regulations.

Statement made on 02 May 2016 at 12:31pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 10 August 2012 to refuse to grant the applicant a Skilled (Provisional) (Class VC) visa under s.65 of the *Migration Act 1958* (the Act).
7. The applicant applied for the visa on 1 December 2009. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.485.224 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because he did not satisfy Public Interest Criteria PIC 4020 (PIC 4020).
8. The applicant applied for review of the primary decision on 29 August 2012 and provided a copy of the department's decision to the Tribunal.
9. The applicant was represented in relation to the review by his registered migration agent.
10. On 30 September 2014 the Tribunal invited the applicant to a hearing to present arguments and evidence on 16 February 2015. The applicant did not appear before the Tribunal at the date and time at which he was scheduled to appear. Following the hearing the applicant provided a medical certificate stated that he was unwell after having returned from India for the hearing. The Tribunal notes that throughout the course of this review the applicant has been overseas in India for extended periods of time. IT was his evidence submission that this has been for continuing medical treatment. On 9 April 2016 the Tribunal was advised that the applicant would again be travelling overseas for a period of months to have medical attention because he is unable to afford this in Australia.
11. The Tribunal, after reviewing information before it, has determined that it does not now consider a hearing to be necessary as it is able to find in favour of the applicant on the basis of the material before it, pursuant to s.360(2)(a) of the Act.
12. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.485.224 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the

application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
- the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).

14. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

15. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
16. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
17. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

Although this was previously contained at s.97 it provisions are essentially the same.

18. The applicant provided to the Tribunal a copy of the primary decision which relevantly records the following:
- On 1 December 2009 the applicant lodged an application for a Skilled (Provisional) (Class VC) subclass Skilled – Graduate (485) visa.
 - On 1 December 2009, in support of the visa application, the applicant provided to the department a skills assessment from Trades Recognition Australia (TRA)
 - To obtain this skills assessment the applicant supplied to TRA documents supporting 900 hours' work experience from La Caprio Restaurant. The employment reference was provided to TRA to obtain a positive skills assessment in the nominated occupation of Cook. This reference was also provided to the Department on 11 January 2012 at the Department's request.
 - The Department received evidence on 30 May 2011 that there were serious concerns about the authenticity of the employment reference letter issued to the applicant by the La Caprio Restaurant, signed by the owner Francis Jamou. As part of the investigation, Department officers visited Francis Jamou at La Caprio Restaurant on 20 May 2011 in regard to employment references written for a number of students including the applicant. Mr Jamou was unable to identify the applicant's photo or provide any evidence of work experience, such as timesheets.
 - In response to an invitation to comment the applicant provided his statutory declaration and also a statutory declaration from Mr Francis Jamou, attesting to the applicant's voluntary work experience from April 2008 to May 2009. The delegate gave these statutory declarations little weight in comparison to the other evidence available to him.
 - Noting that the applicant had provided no new information in relation to the genuineness of his claim the delegate was satisfied the applicant had provided a bogus document to the Department in support of his application.
19. On 10 August 2012 the delegate refused the visa finding the applicant had given or caused to be given to the Department a bogus document as defined in paragraph 97(c) of the Act therefore did not satisfy PIC 4020(1). The primary decision further records that the delegate found no grounds to waive the requirements of PIC 4020(1).
20. Of relevance on the Department file (at folio 5) is a statutory declaration of Mr Francis Jamou in which he relevantly states:

21. [The applicant] has worked in my business at La Caprio Cafe and Takeaway in Thomastown. I have sold the business but from records I can confirm that he was working with me from 14/04/2008 till 18/05/2009 on a voluntary basis.

22. [The applicant] has advised me that he has received a letter from the Immigration Department about his experience with my business. I wish to confirm that he was working with me and he is a very hard-working and soft-spoken young man.

23. [The applicant's] Skills Assessment has been successfully approved as well on the basis of his experience in the obtain from my business. [The applicant] is a quick learner and a good asset to my business at that time.

24. I have moved on and sold my business therefore I will no longer be reachable at the workplace landline number for La Caprio Cafe and Takeaway. If you wish to discuss this further, please contact me on my personal mobile number 0417 309 313.

25. On 27 August 2014 the Tribunal requested information on summons from the department specifically requesting the following:

26. Please provide a copy of all information held by the Department in relation to the finding that the applicant did not satisfy PIC 4020 including but not limited to:

- A copy of the investigation report arising out of evidence the department received on 30 May 2011 (as referred to in the primary decision); and
- General advice as to the information received that lead to this investigation (if it is not included in the investigation report); and
- A copy of the full site visit report of 20 May 2011 to La Caprio Restaurant including the interview with Mr Francis Jamou and;
- A copy of the photograph Department officers showed Mr Francis Jamou during the investigation on 20 May 2011.

27. In response on 19 September 2014 the Tribunal received 14 pages of information (some pages heavily redacted). The Tribunal was not provided with background as to why an investigation into La Caprio Restaurant was commenced which was part of the information summonsed. Relevantly, what was provided was a copy of a document titled 'Operation Lodge – La Caprio Café & Takeaway - Site Visit Summary' and a copy of the handwritten notes made by the officers at the interview on 20 May 2011 (with some personal identifiers redacted). Both documents comprised notes from a site visit and interview with Mr Francis Jamou, the owner [identified as FJ in the documents]. Also provided was a photograph with a number 12 next to it. The applicant's name is not included in the summary report however it states:

28. FJ provided a listing of all the names and dates for each person who did undertake work experience.

29. Within the handwritten notes is the following comment:

30. Shitanshu Behal (the applicant) worked 14/4/08 – 18/5/09 (900 hrs).

31. Of relevance the summary report states:

32. FJ appeared genuine in his responses, showing concern if students were 'doing the wrong thing' however the employer was unable to match any names to the photo board or provide any evidence of such as timesheet records.

33. Also of particular relevance in this report in the comment:

34. FJ was not certain to sign Yes or No photo board, they all looked familiar, not 100% sure...Asked how FJ kept track of 900 hours tally. No timesheets kept. FJ stated that they were just volunteers so I did not think it was important. FJ would base hours on 20 hours per week. FJ stated would have approximately 2 or 3 students working at one time.

35. The Tribunal accords considerable weight to the fact that during the unannounced site visit and interview Mr Francis Jamou specifically stated that the applicant had worked 900 hours between 14 April 2008 and 18 May 2009. He gave this advice to departmental officers after being asked to identify applicants on photo board and responding that they all looked familiar. The Site Visit Report records that Mr Jamou stated that, when presented with the photo board and asked to identify any of the people shown, he was not 100% sure if all the people listed had worked for him and he would not feel comfortable in selecting anyone from the photo board as working 900 hours as it may not be accurate and may not be fair to those who have worked with him if he could not identify them. It was after this that Mr Jamou went to his office and returned with large folder containing payslips, references and a list of the students who had worked for him.
36. Mr Francis Jamou volunteered the name of the applicant and the period of his voluntary employment which accords with the reference the applicant submitted to Trades Recognition Australia in support of his application for a skills assessment. He also stated that he had worked for 900 hours. This is important because in relation to other applicants Mr Jamou stated they had not completed the 900 hours.
37. The Tribunal on review finds this to be strong and independent evidence supporting the applicant's work experience at La Caprio Café & Takeaway.
38. In making this finding the Tribunal has no information before it to doubt the credibility of Mr Francis Jamou. There is nothing on the Department file or in any of the information that has been given to the Tribunal that questions his credibility. In this respect the Tribunal notes that it specifically requested from the Department "general advice as to the information received that lead to this investigation" but its information has not been provided to it.
39. The delegate relied on the inability of Mr Jamou to identify the applicant (or indeed any of the other people whose photos were on the photo board) based on a passport sized photograph shown to him at the interview. The Tribunal notes that this interview was conducted on 20 May 2011 and the applicant's work experience was completed during 2008 and 2009; some 2½ years earlier and Mr Jamou's evidence was that 26 students had undertaken voluntary work experience at the business. Given these factors the Tribunal does not consider that Mr Jamou's inability to recognise the applicant in one particular photo is, of itself, sufficiently probative such that it can be relied upon to lead to a finding that the applicant provided a bogus document to the Department.

40. The delegate also relied on the applicant and Mr Jamou's inability to provide any other evidence of the applicant's work experience such as timesheets. The Tribunal does not find this unusual in respect of voluntary work experience and notes Mr Jamou's evidence to the department investigators that he did not consider this necessary given the volunteer nature of their work.
41. Finally, the Tribunal notes that the primary decision records that the department received evidence on 30 May 2011 that there were serious concerns about the authenticity of the employment reference issued to the applicant by La Caprio Restaurant and signed by Francis Jamou. After some of the information requested on summons had been received from the Department the Tribunal, noting that this specific advice has not been provided contacted the department and asked for this. In response the Tribunal was advised "this investigation was established to verify work experience claims being made by international students seeking Migration Pathways through the Onshore GSM program. Evidence of widespread rorting of this requirement was well documented and supported by numerous investigations including that students regularly obtain fraudulent employment references in support of their skill assessment application to TRA". Because the department has not provided the evidence as requested on summons as to "general advice as to the information received that lead to this investigation" with any specificity, the Tribunal is not able to consider the probative value of any evidence received by the Department on 30 May 2011.
42. The Tribunal, when reviewing the totality of the evidence before it, including importantly the transcript the Site Visit Summary and the contemporaneous handwritten notes taken by the Department officers during the site visit, the latter of which records that Mr Jamou identified the applicant by name and the hours that he had worked, considers this evidence to be credible. Further the Tribunal does not consider that Mr Jamou's inability to recognise the applicant in a small photo shown to him approximately 2½ years after his work experience, to be of such probative value that a conclusion that the applicant provided a bogus document to the Department can be sustained and therefore places no weight on Mr Jamou's non-recognition of the applicant's photograph.
43. The Tribunal further notes that Mr Francis Jamou provided a statutory declaration to the Department declaring that the applicant had worked at his former business La Caprio Cafe and Takeaway on a voluntary basis from 14 April 2008 until 18 May 2009 and that he had provided his personal mobile phone number on which department offices could verify this information. In light of there being no adverse information before the Tribunal questioning the credibility of Mr Francis Jamou, the Tribunal accepts this statutory declaration as the additional evidence of the applicant's claimed work experience that was requested by the Department.
44. Based on the evidence before it the Tribunal has formed the view that the applicant did complete 900 hours of voluntary work experience at La Caprio Café and Takeaway as claimed. It follows that the successful skills assessment the applicant obtained from TRA and submitted to the Department, in support of her visa application, was not bogus or obtained based on false or misleading information.

45. Therefore the Tribunal, on the basis of the evidence before it, is satisfied that there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to his application for a Skilled (Provisional) (Class VC) visa or in relation to a visa that the applicant held in the period of 12 months before the application was made.
46. Therefore, the applicant meets cl.4020(1).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(1)?

47. Clause 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy cl.4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2AA).
48. There is no evidence before the Tribunal to suggest that the applicant has been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made to the present, other than in respect to the decision under review. The therefore Tribunal finds that the applicant satisfies the requirements of PIC 4020(2). Therefore, PIC 4020(2) is met.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

49. Clause 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The Tribunal is satisfied, based on the information before it, on both the department and Tribunal files, the Integrated Client Service Environment (ICSE) records and other identity documents that the applicant is who he claims to be.
50. Therefore, the applicant meets PIC 4020(2A).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(2A)?

51. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA).
52. There is no evidence before the Tribunal to indicate that the applicant has been refused a visa because of a failure to satisfy PIC 4020(2A).
53. Therefore the applicant meets PIC 4020(2B).

54. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.485.224.

DECISION

55. The Tribunal remits the application for a Skilled (Provisional) (Class VC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 485 (Skilled - Graduate) visa:
- Public Interest Criterion 4020 for the purposes of cl.485.224 of Schedule 2 to the Regulations.

Karen Synon
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

- (1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...